United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 17, 1997

TO : Michael Dunn, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters Local 19 (UFCW South Central Union and Employers Health and Welfare Trust Fund)
Case 16-CB-4950

536-2530
536-2581-3342
536-2581-6767

This case was submitted for advice as to whether the Union's failure to demand that the Employer recall the Charging Party pursuant to her seniority is arbitrary or grossly negligent conduct unlawful under Section 8(b)(1)(A) of the Act.

FACTS

Teamsters Local 19 (the Union) became the bargaining representative in January 1995. The Charging Party, Lori Grimes, was laid off on December 3, 1995, along with three other employees. The collective-bargaining agreement between the Union and the Employer requires that employees be laid off and recalled in accordance with their seniority. Union steward Vanessa Hinton was the most senior of the laid off employees. When the layoff occurred, Hinton was on disability leave. The Union filed a grievance regarding her layoff while on disability and that grievance is set for arbitration. Grimes, who was not a member of the Union, was the next most senior employee. The third most senior employee laid off was Union member Leslie Rogers. Due to an error in the seniority roster, employee Rita Marks was retained even though she was less senior than Hinton, Grimes, and Rogers.

The seniority list was posted; it lists Mark's incorrect seniority date. The Employer used this list with the incorrect date to determine which employees would be laid off.

Rogers filed a grievance immediately after the layoff. The Union processed her grievance to the pre-arbitration level. At an Executive Committee meeting between Employer

and Union officials on January 18, 1996, Marks' actual seniority was acknowledged and it was agreed that Rogers, as the grievant, would be reinstated and would receive back wages for the time she was laid off. Two days after Rogers was recalled, she resigned and is no longer associated with the Employer or the Union.

On January 19, 1996, Grimes learned from a fellow employee that Rogers had been returned to work with backpay pursuant to a grievance regarding Marks' incorrect seniority date. According to Grimes, she was not aware of Marks' correct seniority date before Rogers was recalled to work.[1] Grimes filed a grievance on January 31, 1996, complaining that, as the more senior employee, she should have been recalled before Rogers. The Union processed the grievance to the Joint Executive Committee level, where it was denied as untimely. The Employer's position was that Grimes should have filed her grievance when she was laid off in December 1996, rather than wait until Rogers' grievance was settled. The Employer's representatives refused to remedy a grievance it had already settled by recalling and reimbursing Rogers.

Both the Employer and the Union take the position that Rogers was entitled to relief rather Grimes because Rogers took the initiative to file a grievance. The Union contends that it did not approach Rogers to file the grievance; rather, based on her knowledge of Marks' seniority, Rogers approached the Union and requested that a grievance be filed. The Union also contends that it processed Rogers' grievance without knowing whether Rogers was more senior than Marks. However, the Union was aware at that time that Grimes was more senior than Rogers. Although the Union further argues that it has awarded relief to a grievant in the past in situations where the grievant was not the most senior employee entitled to the relief, it provided no examples of such conduct.

The Charging Party in this case is also a Charging Party in Cases 16-CB-4831 and 4839, which allege that the Union violated Section 8(b)(a)(A) by failing to arbitrate grievances relating to wage rates and classifications because the employees who filed the grievances were not

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[1] Rogers' testified that Mark's true seniority was common knowledge at the facility and that Grimes, whose mother-in-law is a supervisor, also knew.

members of the Union. Those cases are currently pending in the Office of Appeals.

ACTION

Complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A) and 8(b)(2) by discriminating against the Charging Party, a nonunion employee, in its grievance processing, based on her nonmembership in the Union.

Apart from its duty of fair representation, a Union violates Section 8(b)(1)(A) if it discriminates against nonmembers when acting in its capacity as exclusive bargaining representative, such as the discriminatory use of the grievance machinery. Such discriminatory conduct restrains and coerces employees in the exercise of rights guaranteed to them by Section 7, and violates Section 8(b)(1)(A).[2] Further, a union violates Section 8(b)(1)(A) and 8(b)(2) by discriminating or causing the employer to discriminate against an employee in hire or tenure on the basis of union considerations. Id. at 708.

In the instant case, we note, first, that Grimes was a nonmember who had filed at least two unfair labor practices against the Union alleging that the Union had discriminated against nonmembers in both negotiations and grievance processing. Without regard the merits of those unfair labor practice charges, it is clear that Grimes did not ingratiate herself to the Union.

Second, there is sufficient evidence to demonstrate that the Union unlawfully discriminated against nonmember Grimes in grievance processing based on Grimes nonunion status. In this regard, we note, first, that the Union knowingly settled a grievance filed by Rogers, a Union member, in a manner that was inconsistent with the seniority provision of its collective-bargaining agreement. The grievance settlement benefited Union member Rogers at the expense of Charging Party Grimes, a more senior nonmember. The settlement provided for Rogers to be recalled from layoff with backpay despite the fact that if the seniority provision of the contract had been followed,

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[2] Toledo World Terminals, 289 NLRB 670 n.2, 707 (1988).

Grimes, rather than Rogers, would have been recalled.[3] Further, while processing Rogers' grievance, the Union clearly knew that Grimes had more seniority, and failed to either notify Grimes of this, recommend that she file a grievance, or settle Rogers' grievance consistent with the contractual seniority provision. Given the fact that contractual benefits are often based on seniority, and that the principle of seniority rights is considered sacrosanct to most unions, particularly in layoffs and recall,[4] it is clear that, absent a reasonable explanation, the Union's knowing and deliberate disregard of the contractual seniority provision in securing Union member Rogers' recall from layoff, and its failure to inform Grimes of her rights prior to settling Rogers' grievance, is sufficient evidence of prima facie case of unlawful discrimination against Grimes.

Third, the Union has failed to rebut the prima facie case by providing an adequate explanation for ignoring the seniority provision of the collective-bargaining agreement. The only explanation provided by the Union is that it has in the past awarded relief to a grievant in situation where the grievant was not the most senior employee entitled to

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[3] We note that although Union steward Hinton was the most senior employee laid off, the Union was protesting her layoff in a separate grievance on the basis that she was on disability leave at the time of the layoff. Thus, she was not available for recall.

[4] According to the Bureau of National Affairs, "[s]eniority provisions, defined as employment service credit, are found in 91 percent of contracts in the Basic Patterns database - 99 percent of manufacturing contracts and 79 percent of non-manufacturing agreements. Seniority is used most often to determine an employee's ranking for purposes of layoff, promotion, and transfer." Collective Bargaining Negotiations and Contracts, Volume 1, "Basic Patterns in Union Contracts", BNA, 1996, Tab 24-501. Further "layoff provisions are included in 94 percent of the Basic Patterns database. Seniority is a factor in selecting employees for layoff in 88 percent of the contracts - 96 percent in manufacturing and 75 percent in non-manufacturing." Id., Tab 24-701.

the relief. However, despite being asked to do so by the Region, the Union has failed to provide evidence as to this alleged past practice. Further, the fact that the Union may have done so in the past is no defense in the circumstances here where a nonmember's contractual rights were so grievously ignored.[5]

In these circumstances, we conclude that Complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(1)(A)and 8(b)(2)[6] of the Act by discriminating against the Charging Party, a nonunion employee, in its grievance processing, based on her nonmembership in the Union.[7]

B.J.K.

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[5] See Teamsters Local 282, 267 NLRB 1130, 1131 (1983), enfd. 116 LRRM 3292 (2d Cir. 1984) (union's decision not to deviate from "normal practice" provides no rationale basis for its decision not to notify employees of terms of an arbitration award.)

[6] [*FOIA Exemption 5*
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[7] [*FOIA Exemption 5*
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